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Supreme Court of the United States

No. 863 October Term, 1970

CLARENCE EUGENE MIDDLEBROOKS, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

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NO._____

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PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

Petitioner submits herewith his jurisdictional statement as required by Rule 23 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion below was decided by the United States Court of Appeals for the Fifth Circuit, Middlebrooks v. United States, Case No. 27859, on August 20, 1970, attached hereto as Appendix.

GROUNDS FOR JURISDICTION

Petition for Writ of Certiorari to the Supreme Court of the United States is brought pursuant to 28 USC 1254(1).

United States Court of Appeals for the Fifth Circuit rendered its opinion on August 20, 1970. Petition for Re-hearing was denied in Order of the same court on September 18, 1970.

QUESTIONS PRESENTED

Whether the Petitioner was denied due process of law when the trial Judge refused to give the additional and clarifying instructions when requested to do so by the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Fifth Amendment:

"Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner was indicted on September 26, 1968, for twenty-one counts of mail fraud. The trial of this case lasted from March 10, 1969 to March 20, 1969, wherein the Defendant acted as his own counsel. After the jury had begun its deliberations, they returned to the Court to ask the trial judge for additional or clarifying instructions. One of the jurymen stated to the Court they, the jury, were having difficulty in understanding the difference between ethical conduct and fraudulent conduct. The trial judge merely responded by saying he couldn't help on that and couldn't go over all that because he didn't have it. Thereafter the jury continued its deliberations and returned a verdict of guilty on fourteen of the counts.

ARGUMENT

Judge Jones, in his dissenting opinion in the court below, stated as follows:

> "If the court had given the jury the help it requested there would be no question as to whether the appellant was convicted of a mail fraud offense or a breach of ethics. If the Court needed help in helping the jury with its problem, it might have found it in the opinion of the Supreme Court where it is said:
>
> > 'It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive' Adler v. Fenton, 65 U.S. (24 How.) 407, 413, 16 L. Ed. 696.
>
> "The problem ought not be quipped off by saying, as the majority has said, 'This question would [illegible] philosophers.' I think the appellant should have a trial free from doubt as to what the jury decided. I dissent."

In the case of *Bollenbach v United States*, 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350, the Court noted that the jury in the case was in obvious confusion over some of the trial judge's charges. The jury had requested additional instructions. The trial judge was apparently "quite cursory". In reversing the Court, in an opinion delivered by Mr. Justice Frankfurter, stated the following criteria when requests are made for supplemental instructions:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required Guidance by a lucid statement of the relevant legal criteria. *When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.* In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction." (Emphasis supplied)

In the instant case, one juror told the Court that they were having difficulties distinguishing ethical conduct from fraudulent conduct. The judge merely replied "I can't help you on that. I can't help you." and then proceeded to a 'quite cursory', and 'unilluminating' instruction.

The Supreme Court in *Bollenbach* concluded its opinion as follows:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of Appellate judges in the guilt of accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Because of the trial judge's failure to alleviate the confusion of the jury in this case, Petitioner was not afforded due process of law by any Federal standard.

CONCLUSION

For the aforesaid reasons, Petitioner respectfully requests this Court to grant the Petitioner for Writ of Certiorari.

Respectfully submitted,

Edward R. Kirkland

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition have been served upon the Solicitor General, Department of Justice, Washington, D. C. 20530, this_____ day of October, 1970.

EDWARD R. KIRKLAND
120 S. Court St., Suite 201
Orlando, Florida

Attorney for Petitioner

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27859

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CLARENCE EUGENE MIDDLEBROOKS, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(August 20, 1970)

Before JONES, WISDOM, and COLEMAN, Circuit Judges.

WISDOM, Circuit Judge: A federal grand jury returned a twenty-one count indictment against Clarence E. Middlebrooks, doing business through Turbonique, Inc., for using the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. § 1341. The defendant, highly intelligent, but not a lawyer, insisted on conducting his own defense. As usual in such cases, his dual position created difficulties for him, for the court, and for the trial jury. The jury found Middlebrooks guilty on sixteen counts and not guilty on three

counts; the Government dismissed the other counts. The trial judge sentenced him to two years imprisonment and fined him $4000 on eight counts. He was given a suspended sentence and a total probationary period of five years to run consecutively to the sentence of imprisonment imposed on count five. Middlebrooks perfected his appeal through retained counsel.

The defendant designed, manufactured, and sold, through the United States mails, supercharger and turbine kits that were virtually impossible for the average mechanic to assemble. These kits rarely contained more than six rough metal castings, although pictures of the kits in various magazines usually showed ten or twelve parts. Turbonique catalogues said: "Can be easily installed with the use of small, basic machine and hand tools." Testimony at the trial revealed that a sixteen inch lathe, drill press, and precision balancing equipment were necessary tools for assembling the Turbonique Model No. C-2-C Supercharger. Perhaps a person with the defendant's eccentric genius for mechanical engineering might be able to take the raw materials and make them operable by adding an ignition system, fuel tank, plumbing fixtures, valves and bearings but this was beyond the capability of the ordinary mortal. The expense of extra machinery, of necessary skilled craftsmen, of special fuel, and of additional parts added up to about $500 to $900 beyond the purchase price of about $100 to $150. This Middlebrooks must have known.

The brochures and form letters the defendant used to sell his product offered supercharger casting kits at a so-called fifty percent dealer discount and also

offered a distributorship for Turbonique products. Every purchaser was offered the discount and a distributorship. Turbonique sent form letters to prospective customers stating that: "Your name was mentioned at a sales meeting with regard to an exclusive Turbonique distributorship in Lapeer County." The only salesman employed at Turbonique was the defendant.

All Turbonique supercharger and turbine "kits" were shipped C.O.D. so that the buyer was required to pay before inspecting the merchandise received. Middlebrooks would then have his money and the purchaser would have nothing of value unless he were willing to expend additional sums of money to make an operable unit. In the final analysis, a buyer of one of the "kits" would either be stuck with something valueless to him and charge off the transaction to experience, or he would have to engage in a series of progressively more expensive purchases to assemble and make operable the initial purchase of rough metal castings. Once a Turbonique customer had parted with his money, there was virtually no hope of obtaining a refund. Return shipments were authorized only for exchange and as credit toward purchases of more expensive supercharger models.

The record shows that the scheme to defraud, for which the mails were an essential element, was premised on half truths, subtle concealment of material facts, and patent falsehoods. Instead of a product "easily installed", a purchaser acquired a few parts which with the addition of other parts and the skills of an electrician, plumber, and machinist, just might some day be part of an operable supercharger.

The accepted principle is that where there is a jury verdict against the defendant, the evidence must be viewed in a light most favorable to the Government. *Shale v. United States*, 5 Cir. 1968, 388 F.2d 616, cert. denied 393 U.S. 984. Even without benefit of this principle, the record compels the Court to hold that the question of the defendant's guilt or innocence was properly submitted to the jury.

On appeal, zealous counsel for the defendant raised eight points. None of these have any merit. We observe that some of the trial judge's comments to which counsel objects were made necessary because of Middlebrooks's dual role as defendant and lawyer for the defense. Middlebrooks argued with witnesses, interjected scandalous and inflamatory remarks, and violated miscellaneous procedural rules during his conduct of the trial. It was a lengthy trial. The district judge showed commendable moderation in keeping the trial on the tracks, and not prejudicing the jury against the defendant, in spite of provocatory conduct on the part of the defendant.

During the course of its deliberations, the jury requested the court to give additional instructions on the definition and elements of mail fraud. One of the jurors had asked for an explanation of the difference between unethical and fraudulent conduct. This question would tax philosophers. In his original charge the trial judge had given proper instructions on the elements of the offense here. We uphold his decision to decline to answer the specific question and to reiterate his original instructions on the elements of mail fraud. See *Eisenhardt v. United States*, 5 Cir. 1969, 406 F.2d

449, 451; *Pope v. United States*, 8 Cir. 1967, 372 F.2d 710, 731, *vacated on other grounds* 392 U.S. 651; *United States v. Hall*, 2 Cir. 1965, 346 F.2d 875, 879, *cert. denied*, 382 U.S. 910; *Clark v. United States*, 5 Cir. 1923, 293 Fed. 301, 304.

We hold that the summaries of complaints received by the Chamber of Commerce and brought to defendant's attention were properly admitted in evidence on the issues of intent and lack of good faith. As the truth or falsity of the items offered was not at issue, the complaints were clearly admissible to establish intent or lack of good faith. *United States v. Press*, 2 Cir. 1964, 336 F.2d 1003, 1010-1012, *cert. denied* 379 U.S. 965, *rehearing denied* 380 U.S. 927. *Accord, New England Enterprises, Inc. v. United States*, 1 Cir. 1968, 400 F.2d 58, *cert. denied* 393 U.S. 1036; *Phillips v. United States*, 9 Cir. 1965, 356 F. 2d 297, *cert. denied* 384 U.S. 962.

The court correctly refused to give a charge that "the Government's evidence must be such as to exclude every reasonable hypothesis other than that of guilt.

> "Circumstantial evidence ... is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in

> weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." Holland v. United States, 1954, 348 U.S. 121, 139-140. 75 S.Ct. 127, 99 L.Ed. 150.

Although the defendant's secretary, Mrs. Kilpatrick, did not testify that she was the custodian of a certain group of records referred to as a "refund ledger", nor that such records were kept in the ordinary course of business, nor when the transactions contained in such ledger were recorded, the defendant attempted to introduce this record through Mrs. Kilpatrick. The proper foundation for introducing this ledger under the Business Records Act, 28 U.S.C. § 1732, was not made. *See e.g. Burger v. United States*, 8 Cir. 1959, 262 F.2d 946, 954, *cert. denied* 359 U.S. 990, *rehearing denied* 360 U.S. 940. The trial court is accorded an area of discretion in determining admissibility of documents as business records and its rulings should not be disturbed unless that discretion has been absued. *O'Brien v. United States*, 5 Cir. 1969, 411 F.2d 522, 524; *McDaniel v. United States*, 5 Cir. 1965, 343 F.2d 785. An examination of what appellant described as refund ledger revealed that checks were issued in many instances without any notation as to what they represented, and many of the entrees merely reflected credit exchanges rather than refunds. A characterization of this hodgepodge of unauthenticated records as a "refund ledger" was a self-serving characterization with no basis in fact. In *Shavin v. United States*, 7 Cir. 1961, 287 F.2d 647, the court held that exclusion of testimony by witnesses having transactions similar to those alleged in the indictment was reversible error where the evidence as a whole disclosed a close ques-

tion as to whether the accused had an intent to defraud or acted in good faith. In the case at bar, the defendant offered no live testimony by witnesses who dealt with Turbonique and received refunds. Nor was the question of his intent a close one. The trial judge properly exercised his discretion in excluding appellant's proffer of unauthenticated, miscellaneous records that appellant called a "refund ledger".

The judgment is AFFIRMED.

JONES, Circuit Judge, Dissenting:

The case was one for the jury, and one which the jury might have decided either way. The case troubled the jury as is shown by the questions asked of the court upon the return of the jury to the court room for further instructions. A juryman stated to the court, "[O]ne of our problems is a difference of opinion as to what is considered ethical and fraudulent conduct." The response of the court was, "I can't help you on that. I can't help you." If the court had given the jury the help it requested there would be no question as to whether the appellant was convicted of a mail fraud offense or a breach of ethics. If the court needed help in helping the jury with its problem, it might have found it in the opinion of the Supreme Court where it is said:

> "It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the

motive." Adler v. Fenton, 65 U.S. (24 How.) 407, 410, 16 L.Ed. 696.

The problem ought not be quipped off by saying, as the majority has said, "This question would tax philosophers." I think the appellant should have a trial free from doubt as to what the jury decided. I dissent.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 863

CLARENCE EUGENE MIDDLEBROOKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner, a manufacturer of supercharger and turbine kits, was convicted on sixteen counts of mail fraud. 18 U.S.C. 1341.[1] Petitioner was sentenced to two years' imprisonment and fined $4,000 on eight counts, and was given a suspended sentence and five years' probation,

[1] The indictment originally contained 21 counts. The jury found petitioner not guilty on three counts and the government dismissed two.

to run consecutively with the two-year sentence, on the remaining counts. The court of appeals affirmed (Pet. App. A.).

In his charge to the jury (Tr. 962-989),[2] the trial judge defined a "fraudulent" statement as one made with intent to deceive for purposes of financial gain by a person who knows it to be untrue or is recklessly indifferent as to its truth or falsity (Tr. 979, 980). Petitioner, who represented himself at trial, took no exception to this instruction although he objected to other aspects of the charge. (Tr. 989, 990).

After the jury had begun its deliberations, the foreman asked the judge to repeat his original instruction because there was confusion as to the elements of mail fraud (Tr. 997). The judge repeated the essence of his previous charge (Tr. 997-1002), and told the jury he would gladly answer any other questions he could (Tr. 1002). One juror stated there was, among the jurors, "a difference of opinion as to what is considered ethical and fraudulent conduct" (Tr. 1002-1003). The judge responded that the jurors must resolve that difference among themselves, since he could not comment on the evidence (Tr. 1003). Another juror asked about the necessity for a unanimous verdict, and the court answered him fully (Tr. 1003-1005). Petitioner took no exception at trial (Tr. 1006), but now argues that he was denied due process of law when the court failed to give additional clarifying instructions distinguishing ethical and fraudulent conduct.

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[2] "Tr." refers to the seven-volume transcript of proceedings before the district court. We are lodging a copy of Volume VII, which contains the instructions to the jury, with the clerk.

If a trial judge's initial charge to the jury is correct, he may, in his discretion, decline to answer a subsequent specific inquiry from the jury on the ground it would require him to comment on the evidence. *Eisenhardt* v. *United States*, 406 F.2d 449, 451 (C.A. 5). Petitioner does not dispute the correctness of the initial charge. Immediately before the judge was informed of the disagreement among the jurors concerning ethical and fraudulent conduct, he had repeated the substance of that charge. This was a sufficient response to any jury inquiries concerning the meaning of fraud. See *United States* v. *Padell*, 262 F.2d 357 (C.A. 2), certiorari denied, 359 U.S. 942.[1]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

Solicitor General.
ERWIN N. GRISWOLD,

NOVEMBER 1970.

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[1] Petitioner relies upon *Bollenbach* v. *United States*, 326 U.S. 607. In that case the trial judge, in response to an inquiry from the jury, gave an off-the-cuff supplemental instruction which this Court described as "simply wrong." 326 U.S. at 613. The Court also criticized the "cursory" nature of the instruction. 326 U.S. at 612-613. The supplemental instruction in this case, by contrast, was neither erroneous nor cursory.

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